to pay the debt or see it paid, or even that the original debtor will pay it, is, so far as the fund in his hands is concerned, a promise for his own debt, or duty, and not that of any other person. This is well illustrated by Gold *vs.* Phillips, 10 Johns. 412; Olmstead *vs.* Greenly, 18 Johns. 12; Mallory *vs.* Gillett, 21 N. Y. Ct. App. 412. And the case of Alger *vs.* Scoville, 1 Gray 391, which is the case of a promise by one debtor to his creditor to pay that creditor's debt to his creditors, may be regarded as resting more upon the same principle of trust, and security from the fund in his hands, than upon the fact of the new promise not being made to the same creditor, according to the case of Eastwood *vs.* Kenyon, *supra.*

But the case of executory contracts to pay money which shall enure in discharge of the subsisting liability of another, may be regarded as resting upon somewhat different grounds. The new party may become the actual principal by the new arrangement, or he may be fully indemnified for assuming his obligation of principal as to the future executory part of the contract; or the principal or original party may have become bankrupt, or insolvent, or insane, so as to be unable or incapable of superintending or furnishing the means to secure the further progress of the work. In such cases, if the new party be in fact the principal, as by security, or interest, or if he consent to act as the principal, on account of the inability or incapacity of the real principal, by assuming to make the future payments in the first instance, he will ordinarily be held responsible, it is believed, without writing. So that, as to executory contracts, it becomes chiefly matter of fact, or of construction, whether the new promissor in fact assumed the attitude of a principal, or stood as a mere surety for the performance of another. I. F. R.

Supreme Court of Pennsylvania.

HIRAM CORSON *vs.* DANIEL H. MULVANY.

Where suit is brought by vendee to enforce an agreement for the sale of land, on a mortgage for two years, and there is no allegation that the vendee's circumstances have changed since the making of the agreement, evidence is not admissible to show that the contemplated use of the land will destroy its value within two years, and that the mortgagor is otherwise unable to pay.

An agreement for the purchase of land at the option of vendee, is not, after election by vendee and notice to vendor, so devoid of mutuality that it will not be enforced.

Nor does the refusal of vendor to accept the consideration, destroy the mutuality, though it gives the vendee an opportunity to retract his election.

The refusal of vendor's wife to join in the conveyance, and the consequent inability of vendee to give a mortgage on the unincumbered fee simple, does not permit vendor to withdraw from his agreement, if vendee waives the release of dower.

The grant of equity powers to the courts of Pennsylvania does not interfere

with their jurisdiction to enforce performance of such an agreement in an ejectment at common law.

This was an action of ejectment, brought by D. H. Mulvany against Hiram Corson, to enforce the specific performance of a paper purporting to be an agreement, as follows:—"Dr. Hiram Corson hereby agrees that D. H. Mulvany shall dig five shafts for iron-ore on the lot of said Corson, fronting on the Spring Mill and Marble Hall Road, and bounded by lands of Joseph Freas and others, in Whitemarsh township, containing seven and three-quarter acres, at any time prior to the first day of April next, 1864, and if said Mulvany shall desire to purchase said tract of land at that time, at the price or sum of $1000, he shall have the right and privilege of so doing, the purchase-money in that case to be paid as follows: $200 cash on the execution of the deed on the said 1st of April, and the balance of $800 in two years thereafter, with lawful interest payable annually, to be secured by mortgage on the premises.

5 5
(STAMP.)
H. C.
D. H. M.
Dec. 12, 1863
5 5

"In witness whereof the said parties have hereunto set their hands and seals, this 12th day of December, A. D. 1863.

"HIRAM CORSON. [SEAL.]
"D. H. MULVANY. [SEAL.]"

On 28th March 1864, Mulvany served a written notice on Corson, of his election to take the land under the agreement, and on the 1st April tendered the payment of $200 and mortgage for balance, which were refused. Previously, on the 21st March, Mrs. Corson gave written notice to Mulvany that the agreement was made without her knowledge or consent, and that she would not sign the deed.

On the trial Corson alleged that the agreement was in the handwriting of Mulvany and retained by him, and in consequence of the confidential relations existing between the parties, Corson signed this paper without reading it, supposing it to be a mere memorandum, allowing the said Mulvany to test the said ground for iron-ore, the said Mulvany owning property in this vicinity; that Corson did not suppose that he was disposing of his property for $200 in cash and a mortgage for $800, payable in two years, when, in the mean time, the ore could be taken out, or the lot so dug up as to leave him without security; an offer to prove which,

and also evidence to show the record liens against D. H. Mulvany, were rejected by the court, and formed the ground of the first and second assignments of error.

Corson further assigned for error—

Points 3 and 4. The ruling of the court that the contract after election had sufficient mutuality to be enforced.

Point 5. The ruling that the refusal of his wife to sign the deed did not prevent specific performance, if the plaintiff waived her joining.

Point 6. The ruling that the plaintiff could have remedy in this form of action.

G. N. Corson, for plaintiff in error.—1 and 2. The first and second specifications will be considered together. We offered to prove, first, that the lot would in two years be so dug up as to make it valueless as a security for the balance of the purchase-money; and secondly, that the unsatisfied mortgages and judgments against Mulvany were to such an amount as left us no personal security as against him, and therefore, as Mulvany claimed to recover on purely equitable grounds, it would have been inequitable for him to take our property without giving us security for the $800 unpaid purchase-money—he paying but $200 in cash. It is well settled that a chancellor will not decree specific performance when the bargain is a hard one, and where there is even a doubt of the fairness of the demand made. A chancellor will even go further, as is decided in *Henderson* vs. *Hays*, 2 Watts 148, and 1 Watts 401, which decide that if even the agreement is perfectly good and binding on both parties, still a chancellor will not decree a specific performance if any doubt about the fairness of the transaction is apparent. This offer manifestly showed that it would have been unconscionable for a chancellor to enforce the performance of an agreement which required the party to part with his property without the purchase-money being paid or secured.

3 and 4. The third and fourth specifications will be considered together. The question presented is whether there was such mutuality in the agreement as bound both parties so that either could enforce performance against the other. The agreement shows that there was nothing binding upon Mulvany to purchase the property at all. Such being the case performance could not be claimed by him against Corson: *Bodine* vs. *Gladding*, 9 Harris

53; *Wilson* vs. *Clark*, 1 W. & S. 555; *Parrish* vs. *Koons*, 1 Pars. 91; *Pugh* vs. *Good*, 3 W. & S. 62, Bright. Eq. 187; *Graham* vs. *Pancoast*, 6 Casey 97; *Elder* vs. *Robison*, 7 Harris 364. All these cases clearly decide, where there is no mutuality in the agreement, specific performance cannot be enforced. The court below in fact concedes this, but avoids the effect of these rulings by holding that Mulvany, on the 28th of March 1864, made his election to take the property, which bound him to do so, and this cured the agreement wherein before it was radically defective on the score of mutuality. Now, then, as this action was founded upon the written agreement, and declared upon it in the *narr.*, and not upon what Mulvany did subsequently thereto, can he recover otherwise than upon the agreement itself? We say that he could not make evidence for himself with the view of making good the agreement which is in itself bad. He could not take all the chances between the 12th of December 1863 (date of agreement) and the 28th of March 1864, of its being an advantageous or disadvantageous purchase to him, without the other party having during the same period the same advantage. The court admit that Mulvany was bound to nothing until March 28th, and if he had found no ore by that time, although he would have had the lot dug up, he could, according to the reasoning of the court, have been under no obligation to take the property. It was, therefore, a one-sided agreement until it suited Mulvany to take it, there being no stipulation in the agreement that he was to have the right to elect to take or not take it between its date and April 1st 1864, and in truth he never did elect to take it without the joining of the wife in the deed, until the day of trial in court, although he had written notice, on the 21st of March 1864, that she refused to sign the deed. We have been unable to find a case where a chancellor would enforce specific performance under such circumstances. This court has certainly never so decided in any of their reported cases.

5. The question is, whether the wife's refusal to sign the deed did not put an end to a decree for specific performance. That it did is decided in the following cases: *Weller* vs. *Weand*, 2 Grant 104, 1 Grant 255, 7 Watts 107, 143, 5 W. & S. 486, 8 Barr 363, Bright. Eq. 192. This position was conceded in the court below, and in order to avoid the effect of the same, Mulvany on the trial offered to take the deed without the wife's joining. Now, even if it be true that the party may do so, yet in no case can it be

shown that the vendor was bound to take a mortgage for part of the purchase-money on such a title. If, therefore, Mulvany had offered to pay in cash the whole purchase-money at the time of the trial, it may be that he had the right to take the deed as he proposed to do. But as he offered and insisted upon our taking the mortgage, it could only be on the interest conveyed by Hiram Corson alone. The agreement contemplated a mortgage upon a clear fee in the land. We were entitled to such a mortgage.

6. Ejectment will not lie to enforce specific performance now. It was originally allowed from necessity (*Coolbaugh* vs. *Pierce*, 8 S. & R. 419); but since the grant of equity powers to the courts, the remedy is on the equity side only.

G. R. Fox, for defendant in error.—The want of mutuality is taken away by the election of Mulvany to purchase: *Kerr* vs. *Day*, 2 Harris 112; Batten on Specific Performance, ch. 5, p. 61; *Palmer* vs. *Scott*, 1 R. & M. 394; *Dowell* vs. *Dew*, 1 Y. & C. 346; *Stansbury* vs. *Fringer*, 11 Gill. & J. 149; *Western Railroad Co.* vs. *Babcock*, 6 Metc. 346.

The consent of vendee to take such title as vendor could give, does away with the objection that the wife refused to join in the deed: *Clark* vs. *Seirer*, 7 Watts 110; *Shurtz* vs. *Thomas*, 8 Barr 363; *Young* vs. *Paul*, 2 Stock. Ch. 414; Addams's Eq. 110; Story's Eq. §§ 775, 779.

The opinion of the court was delivered by

AGNEW, J.—Corson agreed that Mulvany should be permitted to dig five shafts on his lot in search of iron-ore, between the date of his agreement and the 1st of April following, and if then Mulvany desired to purchase the lot at $1000, he should have the right and privilege of doing so; the purchase-money to be paid, $200 on execution of the deed, and $800 in two years thereafter, with interest, and to be secured by mortgage on the premises.

The first and second assignments of error will be considered together. Corson offered to prove that, by the ordinary process of mining ore, the land would be so dug up within two years as to be valueless; and to prove the amount of unsatisfied mortgages and judgments against Mulvany. The rejection of this evidence is alleged to be error, because such facts it is said would have induced a chancellor to withhold a decree for specific performance, which is of grace and not of right.

It is not alleged that Mulvany's circumstances had changed after the making of the contract, and we are asked to withhold relief merely because of consequences growing directly out of the terms of the agreement. There is no proof of fraud or unfairness, nor is there any of weakness of intellect, intoxication, surprise, or any circumstance affecting the capacity of Dr. Corson to contract. His whole case is, that he agreed to sell his lot and defer the payment of $800 of the purchase-money for two years, on the security of a mortgage alone, and that within this time all the ore may be removed from his lot. This was a consequence plainly within his view, in making his contract. Its purpose was to test the lot for the presence of ore. His object was to do this at Mulvany's expense, and if ore were found, to obtain a higher price for his lot. Mulvany was willing to do this, provided, if he found ore, he should have a right to purchase. These are the manifest inferences to be drawn from the contract itself. Now, after ore has been discovered in the fifth and last shaft, he asks Mulvany to be turned away without obtaining the very thing which induced him to expend his means in experimenting. Corson did not bind himself to pay the outlay. How can a chancellor refuse his aid in so plain a case? We see no error in the rejection of the evidence.

The third and fourth errors assert, that the contract is not mutual, because an option was given to Mulvany only to convert the privilege into a purchase. If this be true, it will prevent specific performance, for, it is settled, equity will not enforce specific performance where the remedy is not mutual. Both parties have signed and sealed this agreement, and the language of the instrument clearly imports a covenant on part of Mulvany to pay the purchase-money, if he elects to purchase. The language of a writing may be wholly that of the vendor, yet the vendee's sealing or accepting it will bind him, and whether the action against him should be case or covenant is not material: *Dubbs* vs. *Finley*, 2 Barr 397; *McFarson's Appeal*, 1 Jones 504–10; *Campbell* vs. *Shaw*, 3 Watts 60; *Cott* vs. *Selden*, 5 Id. 525; *Meade* vs. *Weaver*, 7 Barr 330, 331. In the last-named case, the effort of Chief Justice GIBSON was to show, that *covenant* would not lie when the party had not sealed the writing; however, debt or assumpsit might. The English authorities cited in that case, conclusively show that the entry of the grantee, or

his acceptance of a deed-poll, are equivalent to sealing; and covenant will lie.

Then the naked question is, whether in a mutual contract to give an option, the party who gives notice of his election is bound to performance. To assert the negative is simply to deny the power of making a conditional contract, and of declaring that performance shall take place when the contingency happens. If any contract to purchase a vessel at sea upon her safe arrival in port, no one will dispute that an obligation to deliver on one side, and to pay on the other, arises upon her safe arrival. The vessel may never arrive, and the contract is not absolute to performance on either side, till the contemplated contingency occurs; but the contract is binding, and only awaits the event to become binding also to performance.

Now, as a contingency or condition on which performance is suspended, what difference is there between a contingency depending on the action of third persons or the controlling power of Providence, and one depending on the act of one of the parties? The uncertainty which attends the contingency exists in either case. The vessel may not arrive, or the party may not elect, but if either event takes place, the contingency has occurred. A choice or an election is but a fact, and wherein does it differ from any other fact made the condition of performance? The agreement is mutual. One says, I will sell if you conclude to purchase; the other says, I will pay if I do conclude to purchase. He then resolves and says, I have concluded. The contingency upon which performance was rested has happened. Why are not both bound? One would think it a plain case of mutual obligation, to perform on the happening of the event which was fixed as the condition of performance. The buyer tenders his money, and, clearly, the seller is bound to receive it. By the very offer to pay, the purchaser not only recognises the obligation of his previous assent to the contract, but the happening also of the fact on which his obligation to perform rested. The offer or tender is not itself the election, it is but the consequence of it. Election and notice of it precedes the tender.

At this point a new and ingenious turn is given to the argument. It is said, but, if the seller refuse to accept the tender, the purchaser may retract; he is not bound, and of course the remedy is not mutual. But the fallacy lies in this; he is not bound, not because no obligation to perform arose in his election,

but because he sets up the seller's breach of contract by refusal, as a discharge of the obligation. The obligation was there, but because the seller chose not to recognise it, the purchaser now chooses to be discharged from it.

Take a better test. The purchaser writes to the seller, I have concluded to take your property according to our contract. I will leave a deed prepared for your execution, and a mortgage according to the terms, and will meet you to perform our bargain. Will it be said, that after this explicit notice of his election, the purchaser can fly from his contract without a refusal of the seller to accept performance? Then, how can the seller avail himself of his own refusal, as a ground of non-performance, so long as the purchaser declines to avail himself of the discharge which refusal affords?

The error into which the opposite argument runs is in supposing that election is the initiation of a new contract, instead of the stipulation on which performance of an old one rests. It is the idea of a proposition which may be retracted before acceptance, and no contract arises: forgetting, that here there is a contract for election, which prevents a refusal to accept. Therefore, it is said, there can be no obligation without the consent of the other. This loses sight of two facts; first, that a previous assent has been given; and second, that the party notified of the election has no right to dissent. The party is already bound to accept performance, when the election shall be made, and when made his previous assent attaches. He may refuse, it is true, but it is not to decline a proposition, but to refuse performance of a bargain. If it were the initiation of a new contract, as if one should voluntarily offer me his bond, he would not become my debtor until I accept it. I am under no obligation to receive his bond, but if I had bound myself to receive his bond in performance of some stipulation already agreed upon, I would find it difficult to refuse it.

If this case stands in need of authority, it has one directly in point. In *Kerr* vs. *Day*, 2 Harris 112, the agreement was a lease for three years at a certain rent, with the privilege of buying the lot at any time during the term, at the price of $1200, in such payments as might be agreed on, not exceeding ten years from the date. The title passed into Day as purchaser from the lessors, and the lease into the hands of a second assignee of the tenant. The first assignee gave notice of his election to Day the

purchaser. The opinion of this court was delivered by BELL, J., holding, that the title vested upon notice of the election in equity, and operated as a conversion of the lessor's estate into personalty, that the election by the assignee was good against the alienee of the lessors, and he became liable to specific performance, and, moreover, was bound to take notice of the right of election contained in the lease. *Kerr* vs. *Day* has this feature to weaken it, that the instalments were not defined in the agreement, but left to be settled at a period not exceeding ten years. This, no doubt, led to the remark in *Elden* vs. *Robinson*, 7 Harris 365, of LOWRIE, J., who had decided *Kerr* vs. *Day* in the lower court, that the principle was strained to its utmost in *Kerr* vs. *Day*. But he did not deny its authority. In the present case there was nothing left open in the contract, and as soon as Mulvany made his election, his duties under the agreement were fixed and certain. The opinion of Justice BELL is referred to for numerous authorities examined in detail.

Wilson vs. *Clark*, 1 W. & S. 554, and *Bodine* vs. *Gladding*, 9 Harris 50, have no bearing on this case. They were clear cases of a want of mutuality, where the Statute of Frauds in the one, and abandonment of the contract in the other, caused the agreement to be not binding. Admitting to the fullest extent the doctrine of these two cases, that want of mutuality is a bar to specific performance, either upon a bill in equity or on ejectment, we are of opinion there is no want of mutuality in the contract between the parties.

We see no error in the fifth assignment. It is in the power of a party to waive full performance, and accept such title as the vendor is able to give. Mulvany's waiver, therefore, of a release of dower by Corson's wife, took away the force of the objection that she refused to sign a conveyance.

The sixth error raises the question, whether the common law remedy by ejectment, used as a means of specific performance, is taken away by the grant of equity powers to the Courts of Common Pleas. Clearly, the legislature did not intend to take away common law actions by a grant of equity jurisdiction. The Act of 1806, providing that when a statutory remedy is given it must be pursued, does not apply. That law refers to specific remedies given for special cases. But the grant of equity jurisdiction is simply a grant of certain general equity powers in addition to powers already existing, and not in exclusion. It is rather a

novel idea that equity, which is admitted to moderate the law, is to supersede it altogether. It is not necessary to notice the remaining assignments of error in detail; it is sufficient to say, that in none of them do we discover any error.

The judgment is affirmed.

RECENT ENGLISH DECISIONS.

Court of Exchequer Chamber.

LEE AND OTHERS *vs.* JONES.

P., who sold goods on commission for the plaintiffs, being in arrear in his payments to the extent of 1300*l.*, was required by the plaintiffs to give them, in addition to an existing guarantee of 300*l.* from his mother, further security. P. then procured the defendant and others to give a guarantee for three years for the sums set opposite their respective names, in all 300*l.* The agreement recited that P. had for some time past been a salesman for the plaintiffs, he, the said P., giving bills to them for all such coals as were delivered to his order, the bills being floating bills, to be settled for and paid up monthly; there was no recital of P. being then indebted to the plaintiffs, and the present guarantee was expressed to be in addition and supplemental to the former guarantee. To an action against the defendant for his proportion, the defendant pleaded fraudulent concealment of material facts:—Held (affirming the decision of the Court of Common Pleas),

Per CROMPTON, BLACKBURN, and SHEE, JJ., and CHANNELL, B.—That the suppression by the plaintiffs of P.'s indebtedness to them at the time of the agreement entered into, was evidence of fraud to go to a jury.

Per POLLOCK, C. B., and BRAMWELL, B.—That there was no evidence of fraud whatever.

This was an appeal from a judgment of the Court of Common Pleas, discharging a rule to set aside a verdict found for the defendant, and instead thereof to enter a verdict for the plaintiffs.

The declaration stated, that by a certain agreement, after reciting that James Packer had for some time then past been a salesman of coals, upon commission, for the plaintiffs, he, the said James Packer, giving bills of exchange to the plaintiffs for all such coals as might be delivered to his order, such bills being floating bills, to be settled for and paid up at the expiration of the current months during which such bills were respectively running; and after reciting that the plaintiffs requiring security